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No. 09-1271

In the Supreme Court of the United States

RONALD E. BYERS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

A. The Tax Court Recently Rejected Respondent's Claim That In This Case It "Implicitly" Weighed The Worker Classification Determination Common Law Factors; It Confirmed That The Tax Court Here Ignored The Controlling Rule Of *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992)....3

B. Respondent Affirmatively Answered The Petition's Question Presented; He Agrees That The *Darden* Common Law Factors Weighing Rule Applies To Worker Classification Determinations Made In Federal Income Tax Cases.....9

C. The Brief In Opposition Fails To Address The Petition's Argument That The Accuracy Of Worker Classification Determinations In Federal Income Tax Cases Is A Recurring Issue Of Exceptional National Importance.....12

TABLE OF AUTHORITIES

Pages

Cases:

Aymes v. Bonelli,
980 F.2d 857 (2d Cir 1992).....5, 6, 10

Byers v. Commissioner of Internal Revenue,
Dkt. No. 22629-07
(U.S. Tax Court, June 11, 2010)..... 7

FedEx Home Delivery v. NLRB,
563 F.3d 492 (D.C. Cir. 2009).....5, 6, 10

JustMed, Inc. v. Byce,
600 F.3d 1118 (9th Cir. 2010) 2, 6, 10

Lyeth v. Hoey, 305 U.S. 188 (1938) 13

Nationwide Mut. Ins. Co. v. Darden,
503 U.S. 318 (1992).....2, 3, 4, 6, 8, 9, 10, 11, 12, 13

NLRB v. United Ins. Co. of America,
390 U.S. 254 (1968).....4, 11

Short v. Central States,
729 F.2d 567, 571 (8th Cir. 1984)..... 11

Rules:

U.S. Supreme Court Rule 10.....12

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In fairness, Respondent raises incidentally an important subsidiary question that the Court may also wish to consider:

Must courts weigh the common law factors in a worker classification determination objectively, as Respondent argues that the Eighth Circuit did here (i.e. according to their significance in authoritative cases), or subjectively, as the District of Columbia and Second Circuits, and now the Ninth Circuit, instruct(s) (i.e. according to their significance in "the"

case)? Opp. Br. 6-8; *JustMed,Inc. v. Byce*, 600 F.3d 1118, 1126 (9th Cir. 2010).

Beyond that question, the parties agree one issue only is before this Court.

Initially, Respondent affirmatively answers the petition's Question Presented. He agrees that the *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), rule requiring that common law factors be weighed in worker classification determinations applies in federal income tax cases. Opp. Br. 6, 9.

The parties, though, part company on whether the Eighth Circuit and the Tax Court in this case followed the *Darden* common law factors weighing rule. Unlike Petitioner, Respondent claims that it did. Opp. Br. 9. Yet Respondent admits that the Tax Court tallied, or counted, the factors and did not weigh them explicitly. Opp. Br. 7, 10.

Coincidentally, on June 11, 2010, the Tax Court rejected Respondent's "implicit weighing" claim. The Tax Court expressly found in another case involving the parties that when it had this case before it, the Tax Court did not weigh the common law factors. Because the Tax Court itself confirmed that it failed to abide by the *Darden* weighing rule here, Respondent's suggested Question Presented is irrelevant.

Furthermore, the petition argues that ensuring the accurate classification of the nation's workers for federal income tax purposes is a recurring issue of exceptional national importance. Pet. 16-18. The

brief in opposition fails to address that argument. Consequently, Respondent concedes its correctness.

Finally, the parties agree that Petitioner's primary request for relief is:

"[T]hat this Court should grant his petition, vacate the decision below, and 'remand the case with instructions to apply the *Darden* common law factors [weighing rule][sic]'. Pet. 8." Opp. Br. 9 [Omitted words supplied].

Because this case indeed warrants further review, the Court should grant Petitioner's primary, or alternative, request for relief.

A. The Tax Court Recently Rejected Respondent's Claim That In This Case It "Implicitly" Weighed The Worker Classification Determination Common Law Factors; It Confirmed That The Tax Court Here Ignored The Controlling Rule Of *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992).

The United States Tax Court recently rejected Respondent's sole ground for opposing a grant of certiorari. The Tax Court's pronouncement, combined with the logical fallacies in Respondent's brief filed ten days afterward, confirms that this case warrants further review.

Respondent acknowledges that *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), supplies the controlling rule for this case: before a court makes a worker classification determination it

must not only assess certain common law factors, but it must also weigh them. Opp. Br. 6, 9.

The Tax Court here, however, tallied or counted the assessed common law factors. Opp. Br. 7. It then used that factors tally or count to determine Petitioner's worker classification. Pet. 17a. Respondent admits that the Tax Court did not explicitly weigh the factors. Opp. Br. 10. Nonetheless, Respondent claims that the Tax Court satisfied the *Darden* weighing rule because it weighed those factors implicitly. Opp. Br. 9-10.

On that page of its opinion solely relevant in this case, the Tax Court found:

"Of the nine factors, five factors indicate an independent contractor relationship, three factors indicate an employee relationship, and one factor is neutral." Pet. 17a.

In that opinion's very next sentence, the Tax Court wrote, unambiguously:

"We conclude that petitioner is to be treated as an independent contractor for the years in issue and that petitioner is liable for self-employment taxes for each year." Pet. 17a.

Three facts belie Respondent's claim that the Tax Court weighed the common law factors implicitly:

One, the Tax Court's opinion failed to cite either the *Darden* or the *NLRB v. United Ins. Co. of America*, 390 U.S. 254 (1968), cases that even

Respondent cites to support his "implicit weighing" claim. Opp. Br. 6, 9.

Two, the Tax Court's opinion lacks the words "weigh," "weight," "weighed," "weighing," or other words or phrases even remotely indicating that it had weighed the factors.

And three, although Respondent alleges that the worker classification determination methods used by the courts here are "consistent" with those used by the *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009) and the *Aymes v. Bonelli*, 980 F.2d 857 (2nd Cir. 1992) courts, Opp. Br. 7., that allegation is wholly unsupportable.

Respondent makes much of the Tax Court's statement that it would apply the factors "as appropriate under the circumstances," and its supporting citation to *Aymes* at 861. Pet. 15a; Opp. Br. 4, 7, 10. The Tax Court's statement, though, is of absolutely no moment. Suffice it to say that subsequent to its statement, the Tax Court's worker classification determination methods bore no resemblance to the methods used in *Aymes* or *FedEx*.

In *Aymes*, the Second Circuit concluded its worker classification determination with phrases clearly indicating it had weighed the factors, e.g. "[e]xamining the factors for each side in terms of their importance," and "...several important factors...outweigh [other factors]," and "[t]he other factors...cannot outweigh the significance we attach to [a party's intent]." *Aymes* at 864. [Emphases added].

In *FedEx*, the D.C. Circuit cited to *United Ins. Co.* and quoted the [now *Darden*] weighing rule. *FedEx* at 496. That court concluded its worker classification determination by stating, "[w]e have considered all the common law factors, and, on balance, are compelled to conclude they favor independent contractor status" and "[b]ecause the indicia favoring a finding the contractors are employees are clearly outweighed by evidence of entrepreneurial opportunity, the Board cannot be said to have made a choice between two fairly conflicting views." *FedEx* at 504. [Emphases added].

The Eighth Circuit and the Tax Court here, however, stated nothing remotely resembling the *Aymes* and *FedEx* courts' unambiguous statements on factors weighing.

Furthermore, the Second Circuit expressly counsels that "[t]he factors should not merely be tallied but should be weighed according to their significance in the case." *Aymes* at 861. Now, so too does the Ninth Circuit. *JustMed*, *supra*, at 1126 (quoting *Aymes* at 861). And, in similar words, so also does the District of Columbia Circuit. *FedEx* at 504 (n.3) ("The common law test, after all, is not merely quantitative. We do not just count the factors that favor one camp, and those the other, and declare that whichever side scores the most points wins.")

Yet the Tax Court, as did the district court in *Aymes*, merely "gave each factor equal weight and simply counted the number of factors for each side in determining [the worker's classification]." *Aymes* at 861. The Tax Court's method, then, is glaringly inconsistent with *Aymes*, *FedEx* and *JustMed*.

More importantly, however, ten days before Respondent filed his opposition brief, the Tax Court itself declared that when it made its worker classification determination here it did not at all weigh the common law factors:

> "So again, as in Byers I, of the nine factors, five indicate an independent contractor relationship, three indicate an employee relationship, and one factor is neutral. I conclude from this, as did Judge Swift in Byers I, that Mr. Byers is to be treated as an independent contractor for the tax year 2004 and that he is therefore liable for self-employment taxes as well." *Ronald E. Byers v. Commissioner of Internal Revenue*, Docket No. 22629-07 (U.S. Tax Court Bench Opinion issued by Holmes, J., on June 11, 2010). [Emphases supplied].

[Judge Swift issued the Tax Court's memorandum opinion in "Byers I," by which name Judge Holmes distinguishes the case here].

There can be no question that when Respondent filed his opposition brief on June 21, 2010, he well knew how the Tax Court had just recently described the worker classification method it used here.

Notwithstanding his advance knowledge, though, Respondent baldly states three times that the Tax Court had merely "observed" that the factors indicated a 5-3-1 split in favor of an independent contractor relationship. Opp. Br. 4, 5, 9-10.

Additionally, without even so much as a nod toward the Tax Court's then recent opinion of which he was well aware, Respondent bizarrely contends that the Tax Court "did **not** state that it was deciding the case based on that numerical comparison alone...." Opp. Br. 10. [Emphasis added].

In its June 11, 2010 opinion, the Tax Court itself removed all doubt that its making a worker classification determination here immediately following its "numerical comparison" of the factors was not just sequential, but was absolutely consequential.

The Tax Court employed, and the Eighth Circuit endorsed, a mere factors tally and the resulting point score as the sole ground for a worker classification determination. This method violated the weighing rule of *Darden*. Had either court abided by *Darden*, the outcome would have been different.

In no event, however, would this Court need to determine Petitioner's correct worker classification.

The crucial question unanswered here thus far, "Are the factors indicating an independent contractor relationship outweighed by the factors indicating an employee relationship?" would be determined by the Eighth Circuit (or the Tax Court) upon this Court's remand. Such remand would no doubt also instruct other courts that it must apply the *Darden* common law factors weighing rule whenever a worker classification determination arises in a federal income tax case.

That the Tax Court again ignored *Darden* on June 11, 2010 in "Byers II" means that the Eighth Circuit again might ignore it. Should this happen, Petitioner will once more bring before this Court the question presented here. The Court should not wait to encounter the same question it can summarily address now.

B. Respondent Affirmatively Answered The Petition's Question Presented; He Agrees That The *Darden* Common Law Factors Weighing Rule Applies To Worker Classification Determinations Made In Federal Income Tax Cases.

Notwithstanding his immediate attempt to obscure the fact with a different Question Presented, Respondent affirmatively answers the petition's Question Presented. Opp. Br. 6, 9. The parties therefore agree that the *Darden* rule of law requiring the weighing of common law factors in worker classification determinations applies in federal income tax cases.

Respondent confesses, though, that the Tax Court did not weigh the factors here "explicitly." Opp. Br. 10. Nevertheless, Respondent blithely asserts there is "no reason to suppose" the Tax Court would have reached a different outcome had it explicitly weighed the factors, rather than only counting them. Opp. Br. 10.

Notably, although the Tax Court first stated that no single factor is dispositive, Pet. 15a, it then allowed the same found *fact* (i.e. that Petitioner made "truck lease payments") to dispose of three of nine

assessed factors. Petitioner argued that had the courts applied the *Darden* weighing rule, one fact or circumstance could not have controlled the outcome of one-third of the factors. Pet. 10-11. Respondent failed to address that argument on brief. Therefore, he must concede its validity.

Respondent does attempt to further support his claim that the Tax Court "implicitly" weighed the factors by analogy. He first points out that the *Aymes* and *FedEx* courts identified "the most important of the pertinent factors" in their respective cases. Opp. Br. 8, 10. From that observation, Respondent notes that the Tax Court concluded those same "most important" factors indicated an independent contractor relationship here. Ergo, Respondent reasons, the Eighth Circuit and the Tax Court must have weighed the factors (albeit not "explicitly"). Opp. Br. 8, 10. Yet such reasoning is fundamentally flawed.

The first flaw in Respondent's reasoning is that, unlike the *Aymes* and *FedEx* courts, the courts here plainly did not identify any factor as more important than any other factor. Had the Eighth Circuit or the Tax Court simply abided by the *Darden* weighing rule, the application of the rule itself would have revealed, as it did in *Aymes* and *FedEx*, the "most important" factors. This seems to be at least one reason for the *Darden* weighing rule.

Another flaw in Respondent's reasoning is that the District of Columbia, Second and Ninth Circuits do instruct that the common law factors must be weighed—but not according to their significance in the *FedEx*, *Aymes* and *JustMed* cases, or in any other

case. Instead, these appellate courts require that the factors be weighed according to their significance in "the case" then before the trial court.

Lastly, Eighth Circuit authority flatly contradicts Respondent's analogical reasoning in that "the weight given to any single factor **can vary depending** upon the relevant factors involved in a case." Pet. 13 (quoting *Short v. Central States*, 729 F. 2d 567, 571 (8th Cir. 1984)]. [Emphases supplied].

Short recognizes what Respondent does not: a factor's weight in one case is independent from whatever weight, if any, that factor had in another case. *Short* also recognizes that courts must apply the *Darden* weighing rule subjectively, according to the factors' significance in the immediate case, and not objectively, as Respondent claims the Eighth Circuit applied it here, according to the factors' significance in other cases. Respondent doesn't explain what impact he believes *Short* has on his reasoning. His brief simply fails to address it.

Respondent also deftly avoids stating that the courts here actually both "assessed and weighed" the factors. Instead, he states these courts engaged in "analysis," and they proceeded to "analyze" the factors. Opp. Br. 4, 5, 7, 9. The Tax Court may have analyzed the factors. But "analyzed" does not equate to *Darden's* "assessed and weighed." It may also be that the term "analyzed" means "assessed"—but it cannot reasonably mean "weighed." Of course, if this Court meant to say that the factors should merely be "analyzed," then neither *United Ins. Co.* nor *Darden* would have directed that the factors be both assessed and weighed.

When the Eighth Circuit and the Tax Court here merely "analyzed" the common law factors, they rendered superfluous *Darden's* command that they also be "weighed." Their doing so was clear, and non-harmless, error requiring remand.

C. The Brief In Opposition Fails To Address The Petition's Argument That The Accuracy Of Worker Classification Determinations In Federal Income Tax Cases Is A Recurring Issue Of Exceptional National Importance.

The brief in opposition fails to expressly dispute the petition's argument that the question presented raises an issue of recurring national importance. Pet. 16-18. It is difficult to conceive how it could do so. Worker classification determinations are an important and frequent feature in many types of federal litigation, including federal income tax cases.

Rather than confront the petition's argument directly, Respondent simply suggests a very narrow Question Presented. By suggesting it he seems to imply that this case involves only "misapplication of a properly stated rule of law." Sup. Ct. R. 10.

The Tax Court, however, unquestionably revealed in both its opinions involving the parties here that it never applied the *Darden* weighing rule, let alone misapplied it. Further, those Tax Court opinions show that the Tax Court failed to state the *Darden* weighing rule at all, let alone that it had properly stated it.

Additionally, the petition describes one likely scenario if courts are left free to apply or ignore the *Darden* weighing rule in federal income tax cases:

> The federal employment tax burden with respect to multi-federal judicial circuit trucking firms would fall on the trucking firms themselves in some circuits; but the same federal employment tax burden would fall on the trucking firm's drivers in other circuits. Pet. 17-18. Respondent does not bother to argue that such an absurd result could not happen.

The Court can "interpret the congressional will in [this tax case] so as to give a uniform application to a nation-wide scheme of taxation." *Lyeth v. Hoey*, 305 U.S. 188, 194 (1938) (quoting *Burnet v. Hamel*, 287 U.S. 103, 110 (1932)). It can do that by reaffirming *Darden's* common law factors weighing rule, by expressly applying it to worker classification determinations arising in federal income tax cases, and by remanding this case with instructions that the common law factors be "explicitly" weighed.

*****

For the foregoing reasons, and for the reasons stated in the petition for a writ of certiorari, the petition should be granted, the judgment of the Eighth Circuit Court of Appeals should be vacated, and the case should be remanded with instructions to apply the common law factors weighing rule mandated by *Nationwide Mutual. Insurance Co. v. Darden*, 503 U.S. 318 (1992).

Alternatively, the petition for a writ of certiorari should be granted and the case set for briefing and oral argument.

Respectfully submitted,

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September 11, 2010